

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

BLITHESOME HOME, INC.

Employer

and

Case 7-UC-588

**MICHIGAN COUNCIL 25, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO**

Petitioner

APPEARANCES:

Dennis M. Devaney, Attorney, of Bloomfield Hills, Michigan,
and Caryn Devaney, Attorney, of Commerce Township, Michigan, for the
Employer.

Bruce Miller and Richard G. Mack, Attorneys, of Detroit, Michigan, for the
Petitioner.

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

¹ The Petitioner filed a brief and the Employer filed a letter to the Regional Director, both of which were carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner claims to represent certain employees of the Employer.

Background and Overview

The Employer operates and manages three adult foster care homes in Detroit, Michigan. On February 20, 2004, Petitioner was certified as the exclusive collective bargaining representative of the Employer's full-time and regular part-time direct care workers employed at its Rosedale facility, 14922 Minock, Detroit, Michigan; its Chalmers facility, 5945 Chalmers, Detroit Michigan; and its Hillcrest facility, 2008 West Grand Blvd., Detroit, Michigan; but excluding managerial employees office clerical employees, and guards and supervisors as defined in the National Labor Relations Act, and all other employees (Unit).

In filing this petition, Petitioner seeks to clarify the existing unit to include four employees in the position of "lead care worker" (LCW). At the time of the election and certification, the position of LCW worker did not exist. The Employer asserts that the LCWs are statutory supervisors within the meaning of Section 2(11) of the Act.

Following the election, Petitioner filed numerous unfair labor practice charges against the Employer alleging, *inter alia*, failure to bargain with Petitioner and bad faith bargaining. Complaint issued on these allegations, and the alleged unfair labor practices were resolved pursuant to a formal settlement between the parties. On April 29, 2005, the Sixth Circuit entered a judgment against the Employer in which it ordered, among other things, the Employer to bargain in good faith with Petitioner as the exclusive collective bargaining representative of the Unit. The Court also ordered a nine-month extension of the certification year upon the commencement of good faith bargaining. The parties have not yet reached an initial contract.

In around March 2004, about one month after Petitioner was certified as the collective bargaining representative of the Unit, the Employer created the position of LCW at the Hillcrest facility only. There are four LCWs at Hillcrest. On July 13, 2005, following the filing of a charge, an amended complaint issued in Case 7-CA-48486 alleging, among other things, that since about May 6, 2005, the Employer refused to recognize and bargain with Petitioner as the exclusive collective bargaining representative of LCWs, in violation of Section 8(a)(5) of the Act.

On August 1, Petitioner filed the instant petition. On August 9, processing of this petition was blocked by the complaint in Case 7-CA-48486. On October 12, the undersigned approved an informal settlement agreement in Case 7-CA-48486. The settlement left the issue of the LCWs' status within the Unit unresolved. On October 13, Petitioner filed Case 7-CA-49001 alleging, as amended, *inter alia*, that the Employer unilaterally created the position of LCW, refused to recognize Petitioner as the collective bargaining representative of the LCWs, and unilaterally added to the job duties and responsibilities of both LCWs and direct care workers (DCW), all in violation of Sections 8(a)(3) and (5) of the Act. On October 28, after Petitioner filed a request to proceed, the Region resumed processing of this petition. Investigation of Case 7-CA-49001 was thereafter held in abeyance pending the outcome of this proceeding. The hearing in this matter was held on various dates in November and December.

For the reasons set forth below, I find that the Employer has not satisfied its burden of proof that the LCWs exercise any supervisory indicia enumerated in Section 2(11) of the Act with the independent judgment required for a finding of supervisory status. Therefore, they are not supervisors within the meaning of the Act. In so finding, I note that the record includes evidence of LCWs' job duties following the implementation of certain asserted unilateral and discriminatory changes to those job duties after the instant petition was filed. However, these changes are the subject of the charge in Case 7-CA-49001. If proven, the unilateral and discriminatory assignment of supervisory duties to unit employees without bargaining with the exclusive collective bargaining representative could violate Sections 8(a)(3) and (5) of the Act. See *East Michigan Care Corp.*, 246 NLRB 458, 459-460 (1979); *Bay State Gas Co.*, 253 NLRB 538 (1980). Accordingly, in view of the allegations in Case 7-CA-49001, no consideration was given to the LCWs' job duties after the post-petition implementation of the changes.

Since the parties stipulated that if the LCWs are not supervisors, they and the DCWs share a community of interest, I conclude that the unit should be clarified to include the LCWs.

Operations

The Employer provides round-the-clock foster care to adults with physical or mental disabilities out of three adult foster care homes: Rosedale and Chalmers, both six-bed homes with approximately five DCWs each, and Hillcrest, a larger home which, on average, provides care to 29 residents at a time, with approximately 10 DCWs and four LCWs.

The administrator is Loretta Marshall, who divides her time between the three facilities, but maintains no set schedule at any of them. Sharon Roehler is the assistant administrator. She generally works weekdays from 8:00 a.m. through 4:00 p.m. at Hillcrest. She has been employed at Hillcrest since February 2005. At Hillcrest, she hires all staff, and schedules and disciplines employees. Both Rosedale and Chalmers have home managers who are present during the day on weekdays. There are no managers in the three homes on weekends or after approximately 4:00 p.m. on weekdays. At those times, an LCW is the highest ranking person at Hillcrest and DCWs are the highest ranking persons at Rosedale and Chalmers. Should problems arise, a management official—Administrator Marshall, Assistant Administrator Roehler, President Virgil Marshall, Sr., husband of Loretta, or Eric Marshall²—is on-call after hours. The parties stipulated, and I find, that Loretta Marshall and Roehler are supervisors within Section 2(11) of the Act. The parties also stipulated that Virgil Marshall, Sr. and Eric Marshall are supervisors. However, there is nothing in the record to conclude the basis of their supervisory status. Overseer Jimmy Perryman and Program Manager Grace Barzart are employed at Hillcrest. The parties stipulated that these positions are not included in the Unit. However, the record is silent on whether they are supervisors within the meaning of the Act.

At Hillcrest, there are three eight-hour shifts: day shift, 6:00 a.m. to 2:00 p.m.; afternoon shift, 2:00 p.m. to 10:00 p.m., and midnight shift, 10:00 p.m. to 6:00 a.m. Generally there are two DCWs and one LCW on all shifts, except for weekday day shifts when there is one DCW, one DCW/cook,³ and one LCW. The facility has three floors. The DCWs and LCW on a shift either each take a floor to clean and monitor, or the DCWs each take a floor and a half. Each worker fills out a floor assignment book which documents what floor they are responsible for during each shift. The Employer also maintains a posted chart that outlines the times residents receive medication and the times meals are served.⁴

Duties of DCWs

DCWs tasks are outlined in detailed job descriptions for each shift. During the time period covered by the record evidence, the Employer used two different sets of job descriptions. The first was in place when Roehler became assistant administrator. The second was implemented shift by shift in July and August 2005.⁵ DCWs provide personal care to residents, prepare and serve meals, clean,

² Eric Marshall's title is not reflected in the record. He is the son of Loretta and Virgil Marshall, Sr.

³ The parties stipulated, and I find, that the position of direct care worker/cook is in the Unit.

⁴ The record does not reflect who prepares the chart, how it is maintained, or when or if it is updated.

⁵ In Case 7-CA-49001, as amended, Petitioner alleges that the second job description was implemented unilaterally in violation of Sections 8(a)(3) and (5) of the Act.

know where residents are going when they leave the home, make appointments and assure residents keep them, conduct fire drills and inspect fire extinguishers once a month, ensure residents follow house rules, complete required reports, wash the linen and personal clothing of all residents, assist residents in their daily living skills, report any accidents or incidents within the home or elsewhere concerning residents, dispense medication, monitor residents' behavior, and record progress notes setting forth goals for the residents and what the residents have accomplished each day in a log book.

Both sets of job descriptions detail responsibilities and break tasks down according to the times they are to be accomplished. For example, the second job description for the day shift states that at 8:30 a.m., the DCW is to make sure the dining room and kitchen are cleaned after breakfast, and specifies that this entails sterilizing the kitchen counters, washing all the dining room tables, cleaning the stove, making sure there are no dishes left in the sink, locking all the cabinets in the kitchen for safety reasons, locking up all cleaning supplies, and sweeping and mopping the kitchen floor. The job descriptions contain schedules of similarly detailed instructions for each shift throughout the day.

One DCW testified about the duties of DCWs; he works midnight shift, and has worked for the Employer for 9 or 10 years. He testified that he follows the DCW job description in performing his duties. He also has trained DCWs and LCWs on how to dispense medication, complete documentation, and conduct fire drills. Approximately once a month, according to his testimony, there is no LCW on his shift.

Duties of LCWs

Job Descriptions

During the time period covered by the record, the Employer also utilized two different job descriptions for LCWs. The first was in place when Roehler became assistant administrator.

According to that job description, which is entitled "direct care worker-lead," LCWs must: meet with DCWs to ensure that they learn the primary policies, procedures, and functions of the DCW position, as well as location of key documents, equipment, and supplies; monitor the assisting and directing of residents as necessary; ensure compliance with all Department of Mental Health (DMH), Family Independence Agency and Consumer Link Network Services policies and procedures; conduct monthly fire drills and monitor documentation of fire drills; complete the DMH Incident Report for all resident incidents or

accidents, and fax the report to Consumer Link Network Rights within 24 hours of the occurrence; and ensure snow is shoveled and steps are free from ice. The job description states that “[w]hen fully staffed, DCW-lead staff are not to spend more than one hour of their eight hour shift cleaning.”

In addition, the job description states that LCWs are responsible for: knowledge of policy and procedures of the home; assisting with training of all new DCWs; knowledge of the operation of commercial equipment (stove, refrigerator, air conditioner); completing reports on a timely basis and submitting them to management; completing logbooks on residents on a daily basis; ensuring snow from walkway, porch, and sidewalk is cleared and salt is sprinkled; submitting reprimands to administration for review and ensuring the reprimands are returned to the DCW in question within 24 hours of the infraction. The job description also states: “DCW must work in the home or on the premises at all times,” and “DCW must keep the home clean and safe at all times.”

The second job description was implemented in approximately September 2005, after the instant petition was filed. Its implementation is alleged in Case 7-CA-49001 as a unilateral change in violation of Sections 8(a)(3) and (5) of the Act. It tracks the first job description, but includes some additions, deletions, and modifications⁶. Those changes to LCWs’ responsibilities are as follows: meet with DCWs *to oversee and* ensure that they learn the primary policies, procedures, and functions of the DCW position, as well as location of key documents, equipment, supplies; *provide training*; *provide monitoring of DCWs as they assist* [“the assisting” deleted] and direct [“ing of” deleted] residents, [“as necessary” deleted]; assign work to DCWs, including floor assignments; direct DCW’s work to ensure compliance with medication and meal schedules and that residents get to programs on time; direct additional work as needed; oversee and ensure compliance with all Department of Mental Health, Family Independence Agency and Consumer Link Network Services policies and procedures; monitor and oversee removal of safety hazards; [“assisting with” deleted] training new DCWs; ensuring cleanliness standards are met; and *ensuring DCWs comply with safety standards*.

In addition, the language in the first job description regarding the submission of reprimands to administration for review and ensuring the reprimands are returned to the DCW in question within 24 hours of the infraction was modified so that LCWs’ responsibilities now include writing reprimands; recommending appropriate discipline; meeting with DCWs within 24 hours of an

⁶ Language added when compared with the first job description is in italics, deletions are in brackets.

infraction; and discussing and making appropriate recommendations regarding DCW staff, up to and including discharge, when necessary, with Roehler.

Finally, the language from the first job description which states “when fully staffed, DCW-lead staff are not to spend more than one hour of their eight hour shift cleaning,” “DCW must work in the home or on the premises at all times,” and “DCW must keep the home clean and safe at all times” is omitted from the second job description.

Performance of LCWs duties

The record contains testimony of three LCWs. One LCW worked primarily afternoon shift from March through October 2005; one LCW worked primarily midnight shift from approximately April to November 2005; and one LCW worked primarily day and afternoon shifts from approximately August 2005 through the present. Two of the LCWs who testified were DCWs before they became LCWs. The other LCW was a temporary employee who worked as a DCW until she was hired by the Employer as an LCW.

The two former LCWs testified that their duties did not change when they became LCWs. They continued to clean, do bed checks, mop floors, empty trash cans, clean baseboards, sweep floors, pass medications, and complete progress notes and incident reports. They both spent five to six hours cleaning per shift, did not check DCWs’ work, and never trained DCWs. When they were not cleaning, they were on break or completing documentation. Both testified that they were never told they had oversight over DCWs. The currently employed DCW who testified stated that LCWs and DCWs have done, and continue to do, the same work.

The currently employed LCW testified that, except when she is the LCW on a weekday day shift or Hillcrest is not fully staffed, she now hardly does any of the duties she did as a DCW, spending only an hour cleaning. However, she also testified that there was a time when she, as a LCW, cleaned floors on shifts other than the day shift. The record is silent as to when or why this practice changed.

When she works on a weekday day shift, the currently employed LCW performs the same tasks as a DCW because only she and a DCW are on the floors. She also performs DCW duties when Hillcrest is not fully staffed, which is 25 to 50% of the time. On shifts other than weekday day shift, she testified that her responsibilities are to assign duties to DCWs, ensure that the DCWs carry out their duties, and write and review progress notes. She assigns work by following the DCWs’ job descriptions. If extra work is given to her by Roehler, she asks a

DCW to do it. She trains new hires and current DCWs in how to do documentation, and to do the tasks in their job description.

One of the former LCWs testified that the only tasks she performed listed on the second LCW job description were completing the Department of Mental Health Incident Report for all resident incidents or accidents, ensuring that incident reports were sent to Consumer Link Network Rights within 24 hours of the occurrence, and knowing the policy and procedures manual. DCWs are responsible for each of these tasks as well. She testified that she was told the LCW was in charge if no administration personnel were present.

The other former LCW testified that, of the duties outlined in the second LCW job description, she had assigned work to DCWs when Roehler told her to do so, conducted fire drills, completed incident reports on incidents she had witnessed, which DCWs are required to do as well, operated commercial equipment, and completed log books on a daily basis. She had not performed the remaining tasks in the job description, nor was she told she was responsible for those tasks.

Both DCWs and LCWs pass medications to residents. Both are responsible for making entries in the communication log book. Both review progress notes to learn the status and activities of the residents. The two former LCWs testified that they did not evaluate the progress notes of DCWs for correctness, nor had they been told to do so. The currently employed LCW testified that she has written up DCWs for improper documentation. However, these writeups occurred after the implementation of the second LCW job description.

The two former LCWs and the DCW testified that floors were chosen to clean and monitor by DCWs and LCWs on a first come basis. The employee who came to work first was able to choose his or her floor and write it in the floor assignment book, regardless of whether he or she was a DCW or LCW. The currently employed LCW stated that she assigns floors by rotating floor assignments between DCWs. However, as noted, she also testified that earlier in her tenure as an LCW, LCWs had taken floors to clean and monitor. She did not testify regarding what method was used at that time to decide which floor each DCW and LCW took.

Discipline

LCWs write up DCWs for various infractions. The currently employed LCW testified that in August, September, or October 2005, after this petition was

filed, the Employer began using new disciplinary forms and changed the effect of LCWs' write-ups. This change was announced at a meeting. With the new disciplinary forms, it was announced that LCWs would be issuing something that could lead to an adverse action against a DCW, whereas before, the write-up served only as a warning. In her testimony, Roehler denied any change in the discipline procedure.

DCWs have been written up by LCWs for failing to do documentation, having alcohol on the premises, and for medication errors. Roehler testified that all write-ups are forwarded to her. She reviews the disciplines and employees' files, investigates the incidents if warranted, and decides on the appropriate punishment. According to Roehler, an LCW has never issued a reprimand that has not been reviewed by her or the Employer's counsel, and Roehler can, and has, overruled disciplines prepared by an LCW. Only the currently employed LCW testified that she drafted write-ups on her own initiative. However, the four write-ups in the record that she drafted were all dated after the Employer implemented the second LCW job description. She could not recall drafting any write-ups prior to the meeting where the change in disciplinary effect was assertedly announced.⁷

The former LCWs testified that they had written disciplines for employees only after directed to do so by Roehler or Loretta Marshall.⁸ LCWs do not suspend or terminate employees, even in the case of egregious conduct. During the time Roehler has been assistant administrator, 10 rule infractions have been reported by LCWs, and all but one resulted in discipline.

Other Supervisory Indicia

None of the LCWs who testified have hired, fired, suspended, or laid off a DCW, or effectively recommended such action. They have not investigated employee misconduct or sent a DCW home. None have granted a DCW's request for time off or vacations, or granted a wage increase or bonus to a DCW. None of them have granted, assigned, or mandated overtime. The currently employed LCW testified that she has found employees to voluntarily work overtime without calling Roehler. The other two LCWs have not done so.

⁷ There were other write-ups in the record dated both before and after the implementation of the second job description. However, the LCWs who assertedly initiated them did not testify regarding their role in drafting the disciplines.

⁸ The record contained two additional write-ups ostensibly authored before the implementation of the second job description by an LCW who testified that she did not recognize the write-ups. While the write-ups had her name printed as the party initiating them, they did not have her signature on them.

LCWs did not evaluate employees prior to the change in job descriptions. In approximately October 2005, LCWs were given the responsibility for evaluating DCWs. Thereafter, during the course of the hearing, LCWs completed evaluations for all of the DCWs. According to the Employer, these evaluations will not result in discipline or have any impact on promotion or wage determinations. Rather, they will be used to identify areas in which employees need additional training.

When employees call in late, they inform the person who answers the telephone, whether that person is a DCW or LCW. Whoever takes the call writes a notation in the staff communications log.

Secondary Indicia

LCWs have not received discipline for a DCW failing to perform his or her job. The currently employed LCW testified that Roehler told her that she would be held accountable for DCWs performing their duties, but the record does not establish when she was told this. Another LCW testified she was never told she would be held responsible for DCWs failing to perform their jobs.

There is a set of facility keys that is passed from shift to shift. Both LCWs and DCWs carry them at various times. LCWs do not have their own office, either individually or collectively. There is a front office to which LCWs and DCWs have access, which contains the time clock and the staff communication log. LCWs do not have access to personnel files. LCWs earn \$8 an hour, and DCWs earn between \$6.50 and \$8.00 an hour.⁹ The Rosedale and Chalmers home managers earn approximately \$10 an hour, while Roehler earns \$14 an hour. LCWs do not receive health insurance. One or two DCWs receive health insurance.

Both DCWs and LCWs punch a time clock to record their time worked. They receive the same amount of time for breaks, based on hours worked. Roehler schedules breaks for both DCWs and LCWs. Neither DCWs nor LCWs wear uniforms. DCWs and LCWs receive the same training in medical documentation, medicine administration, CPR, and first aid. LCWs do not require any different or additional licenses or certifications to hold their jobs; they receive no additional training when becoming LCWs.

⁹ The record does not include precise wage information for each DCW and LCW.

Analysis

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive, so that the possession of any one of the enumerated authorities places the employee so invested in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994).

However, if every minor order made its issuer a supervisor, our industrial composite would be predominantly supervisory. *Providence Hospital*, 320 NLRB 717, 725 (1996), quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Azus Ranch Market*, 321 NLRB 811, 812 (1996). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and require the use of independent judgment. This means that the discharge of Section 2(11) functions in a routine or clerical manner, or the use of independent judgment to solve problems unrelated to Section 2(11) functions, does not qualify as supervisory. *Alois Box Co.*, 326 NLRB 1177 (1998).

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court upheld the Board’s longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999) (any lack of evidence in the record is construed against the party asserting supervisory status); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); see *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 fn. 7 (1989); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986).

This record does not establish that LCWs hire, transfer, suspend, lay off, recall, promote, discharge, or reward other employees, adjust their grievances, or effectively recommend such action. While not articulating the basis for its claim of supervisory status, the evidence offered by the Employer relates to the LCWs' authority to assign work to, responsibly direct, discipline, and evaluate employees.

As noted at the outset of this decision, because of the pending allegations in Case 7-CA-49001, in reaching my conclusions regarding supervisory status, no consideration was given to the LCWs' job duties after the post-petition implementation of changes in those duties. If the pending allegations are proven, the unilateral and discriminatory assignment of supervisory duties without bargaining with Petitioner could violate Sections 8(a)(3) and (5) of the Act. See *East Michigan Care Corp.*, 246 NLRB 458, 459-460 (1979); *Bay State Gas Co.*, 253 NLRB 538 (1980).

Assign and responsibly direct

Assignment and direction of employees does not constitute supervisory authority when exercised in a routine manner or circumscribed by management directives. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381-382 (1995); In performing their jobs, DCWs follow a schedule of tasks to be completed at predetermined times. The only instances of LCWs assigning additional tasks to DCWs occurred when management directed the LCWs to do so.

The currently employed LCW was the only witness who testified that she assigned floors to DCWs, and it is not clear from the record when she began doing so in relation to the asserted unlawful implementation of new LCW job duties. Further, when she has assigned floors, she has done so by rotating the DCWs between the floors. The implementation of an assignment rotation is routine and does not involve the use of independent judgment, especially where, as here, employees are interchangeable based upon their skill sets. *Permanent Label Corp.*, 248 NLRB 118, 134-135 (1980).

LCWs telephone employees to seek volunteers to cover staffing shortages. Two LCWs testified that they did so only after consulting with Roehler. The third testified she may try to find a volunteer without first consulting Roehler. The record establishes, however, that LCWs are not empowered to mandate that DCWs come in or stay past their quitting time. Merely seeking voluntary replacements for absent employees does not constitute supervisory authority. *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998); *Providence*

Alaska Medical Center v. NLRB, 121 F.3d 548, 552-553 (9th Cir. 1997); ***Children's Habilitation Center, Inc. v. NLRB***, 887 F.2d 130, 134 (7th Cir. 1989).

Another purported element of LCWs' responsible direction is their role in checking and correcting DCWs' work. However, the record does not establish that the LCW who testified she checks and corrects DCWs' work did so prior to the change in LCWs' job duties in September 2005. Further, the other two LCWs testified that they were never told they had oversight over DCWs' work and did not check DCWs' work. In addition, the only DCW to testify stated that he had instructed both DCWs and LCWs on the correct way to perform fire drills, dispense medications, and perform documentation.

Instructions given by a more experienced employee to a less experienced employee is not responsible direction of employees. ***First Western Building Services, Inc.***, 309 NLRB 591, 601 (1992). Moreover, generally showing other employees the correct way to perform a task does not confer supervisory status. ***Franklin Home Health Agency***, 337 NLRB 826, 831 (2002). Also, giving minor orders during the course of a workday does not necessarily make an employee a supervisor. ***Providence Hospital***, 320 NLRB 717, 725 (1996), citing ***NLRB v. Security Guard Service***, 384 F.2d 143, 151 (5th Cir. 1967). Likewise, keeping operations running smoothly is not enough for finding supervisory status. ***California Beverage Co.***, 283 NLRB 328, 330 (1987). Accordingly, I find the LCWs' assignment and direction of employees, to the extent that it exists on this record, to be limited and circumscribed by Employer procedure and not an exercise of supervisory authority. ***Dynamic Science, Inc.***, supra.

Discipline

The LCWs' involvement in the disciplinary process is ministerial. The record contains the testimony of two LCWs who drafted write-ups prior to the implementation of the new job descriptions, and they both testified they did so only after instructed to do so by Roehler or Marshall. Only one witness testified that she submitted documentation of rule infractions without being directed to do so by management, and those were all dated after the implementation of the new job descriptions. Roehler reviews all write-ups forwarded to her, investigates the incident if warranted, decides on the appropriate punishment, and can, and has, overruled LCWs' recommendations to discipline.

The Board has repeatedly held that individuals who perform a reporting function with respect to disciplinary matters are not supervisors within the meaning of the Act. ***The Ohio Masonic Home, Inc.***, 295 NLRB 390, 394 (1989); ***NLRB v. Attleboro Associates***, 176 F.3d 154, 174 (3rd Cir. 1999); ***NLRB v. City***

Yellow Cab Co., 344 F.2d 575, 580-581 (6th Cir. 1965). The signing of disciplinary warnings on the line for supervisor does not alone convey authority under Section 2(11), especially when, as here, issuing the discipline requires management approval. ***Carlisle Engineered Products, Inc.***, 330 NLRB 1359, 1360 (2000); ***Necedah Screw Machine Products, Inc.***, 323 NLRB 574, 577 (1997). Further, being vested with the title “supervisor” does not make someone a statutory supervisor. ***Carlisle Engineered Products, Inc.***, *supra*.

The Employer cites ***Wilshire at Lakewood***, 345 NLRB No. 80 (Sept. 30, 2005) in support of its position that LCWs are supervisors. There, the Board found that the individual at issue was a supervisor where her duties included checking to see whether employees performed their tasks correctly, correcting employees if they did something wrong, and, at her discretion, documenting infractions on a disciplinary form. A disciplinary write-up would initiate further review by managerial officials, as well as a determination of whether further disciplinary action against the employee was warranted. In addition, the supervisor reported to management on at least two occasions that employees were unfit for work, resulting in adverse action against the employees. She also granted employee requests to leave work early, and performed evaluations of employees which affected their job status.

In contrast, the record in this case fails to establish that LCWs undertook write-ups on their own initiative prior to the job changes in September. As discussed above, the LCWs did not check or correct DCWs’ work using independent judgment prior to the implementation of the job changes, if at all. They did not evaluate employees, grant employees time off, or recommend discipline as the supervisor in ***Wilshire at Lakewood*** did. Thus, I find that case inapposite.

Evaluations

It appears from the record that evaluating employees is a new task given to LCWs after the filing of the instant petition. Further, the LCWs’ input into performance evaluations appears to be a reporting function and has no effect on discipline, compensation, or promotions for bargaining unit personnel. ***Ten Broeck Commons***, 320 NLRB 806, 813 (1996); ***Passavant Health Center***, 284 NLRB 887, 891 (1987); ***Hausner Hard-Chrome of KY, Inc.***, 326 NLRB 426, 427 (1998). There is no showing that evaluations done by LCWs have an effect upon DCWs’ job tenure or status. Because evaluating is not a statutory indicium of supervisory authority, the Board, with court approval, has consistently declined to find supervisory status based on evaluations, without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the

evaluated employee's job status. *Ten Broeck Commons*, supra; *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994); *New York University Medical Center v. NLRB*, 156 F.3d 405, 413 (2nd Cir. 1998); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042, 1046-1047 (8th Cir. 1998).

Secondary Indicia

Secondary indicia of supervisory status is not sufficient to confer supervisory status, where, as here, evidence of primary supervisory authority is absent. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). Further, I note that secondary indicia is not present in this case. LCWs do not have health insurance, while some DCWs do. LCWs and DCWs have access to the same office and both carry keys to the facility. One LCW testified that she earned the same wage rate while she was a DCW as she does as a LCW. In addition, if the LCWs were found to be supervisors, this would create an unreasonable ratio of at least two or three supervisors to two bargaining unit employees on weekday day shifts.¹⁰

LCWs are the highest ranking and may be the highest paid individuals during weekend, midnight, and portions of afternoon shifts. However, management is always on call. In addition, DCWs who work at the Rosedale and Chalmers facilities on those shifts are also the highest ranking individuals present, and it is uncontested that they are Unit employees. Further, service as the highest-ranking employee on site does not make the employee a supervisor. *Training School at Vineland*, 332 NLRB 1412 (2000), and cases cited.

Conclusion

For the reasons set forth above, and based on the record as a whole, I conclude that the Employer has not sustained its burden in establishing that the LCWs were supervisors as defined in the Act at the time in approximately September 2005 when the second LCW job description was implemented. Thus, I find the LCW are employees. This finding likely will not be affected by the investigation of the charge in Case 7-CA-49001. If the LCWs are found still not to be supervisors, then they, of course, will remain in the Unit. If they are found to have become supervisors as a result of the Employer's alleged actions, the addition of supervisory authority may be found to have violated Sections 8(a)(3) and/or (5) of the Act. Such a finding would likely result in the rescission of the

¹⁰ Because the record is silent on what hours Eric Marshall and Virgil Marshall, Sr. are at the facility, and on the supervisory status of Overseer Perryman and Program Manager Brazart, the ratio could be even greater.

supervisory authority and the continued inclusion of the LCWs in the Unit. Accordingly,

IT IS ORDERED that the Petitioner's requested clarification to include the LCWs in the Unit is granted, and the Unit is clarified to include the LCWs.¹¹

Dated at Detroit, Michigan, this 8th day of March, 2006.

"/s/[Stephen M. Glasser]."

(SEAL)

/s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
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¹¹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the **National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by March 22, 2006